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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000909-MR

GARY AFTERKIRK — APPELLANT

v.

APPEAL FROM GRANT CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 00-CI-00378

BOARD OF EDUCATION OF
GRANT COUNTY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND HUDDLESTON,[1] JUDGES.

EMBERTON, CHIEF JUDGE. Gary Afterkirk applied for and was denied the position of assistant athletic director with the Grant County School System. He filed the present action alleging that the denial was the result of discrimination based

[1] Judge Huddleston concurred in this opinion prior to his retirement effective June 15, 2003.

on age, physical disability, and in retaliation for his request for disability accommodations. The trial court granted summary judgment in favor of the Board and this appeal followed.

Afterkirk is fifty-six years old and since 1988, has been a teacher in the Grant County School System. From 1991 to 1998, he was a health and physical education teacher until he took disability leave because of problems with his left knee. After having various surgeries on his knee, Afterkirk returned to the school system for the 1999-2000 school year as a driver's education teacher and head baseball coach at the Grant County High School.

In the spring of 2000, the Board advertised a vacancy for the position of assistant athletic director, a newly created position to assist the Grant County Athletic Director, Larry Bell. Afterkirk applied for the position as did Matt Morgan, a non-disabled male under age forty. The job description for the position included the conditioning of elementary basketball players, supervising the elementary football program, working with the Grant County Middle School athletic programs, and generally assisting the athletic director.

Afterkirk throughout his education career coached various high school sports and at one time was an assistant baseball coach for Georgetown College. Additionally, he had taken athletic director courses at Xavier University. He points

out that his duties as a coach required him to maintain the sports fields, schedule and supervise games, order uniforms, and other details related to the management of sports teams.

The successful applicant, Morgan, was the assistant principal at Grant County Middle School. At the time he applied for the position as assistant athletic director he was thirty-four years old and head football coach at the middle school.

Both candidates were interviewed for the position by a committee consisting of Mr. Bell, Ron Livengood, the principal at Grant County Middle School, and Mark Hudson, the principal at Crittenden-Mt. Zion Elementary School. The candidates were asked a series of pre-set questions and at no time during the interview were any physical requirements of the job discussed. After the interview, all three committee members expressed their opinions and ultimately concluded that Morgan possessed the superior administrative skills and experience with elementary and middle school children.

Afterkirk believes his coaching, experience as a player coupled with his management experience in the insurance business, render him more qualified for the position. It is his contention that the entire interview process was a “sham” based on his allegation that Wanda Hammons, the payroll clerk for the Grant County Schools, prior to the interviews, told Afterkirk that Morgan had been hired for the position. Afterkirk, upon

hearing the "rumor," approached Bell who denied that Morgan had been hired. Other than Afterkirk's testimony there is nothing in the record to substantiate this allegation.

Afterkirk's initial contention is that he was not hired for the position because of his age. To prevail, Afterkirk must demonstrate that discrimination was the determining factor in the decision not to hire him for the position. There must be "cold hard facts" creating an inference that discrimination was a determining factor.[2] In Harker, supra, the court explained in depth the summary judgment procedures applicable to age discrimination claims and analyzed the landmark decision of McDonnell Douglas Corporation v. Green,[3] and adopted a three-stage analysis:

> First, the plaintiff must show that he (1) belongs to the statutorily protected age group, (2) performed his job satisfactorily, (3) was nonetheless terminated, and (4) was replaced by a younger person.
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> Second, once a prima facie case has been established, the employer has the burden of producing evidence that the applicant was discharged for a legitimate nondiscriminatory reason.
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> Third, with the inference of discrimination rebutted, the burden returns to the plaintiff to produce specific facts, not mere assertions.[4]

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[2] Harker v. Federal Land Bank of Louisville, Ky., 679 S.W.2d 226, 229 (1984).

[3] 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

[4] Id. at 230.

The court adopted the McDonnell approach along with the case-by-case approach developed by the federal sixth circuit.[5] "In the absence of specific evidence of age discrimination, a summary judgment is proper."[6] The mere hiring of a younger person, such as in this case, does not entitle the plaintiff to a presumption that age discrimination is the cause.

We have reviewed the record and find no "cold hard facts" that Afterkirk was discriminated against because of his age. Both candidates were interviewed and asked a series of questions, after which the committee members expressed valid, non-age related reasons for hiring Morgan. Afterkirk believes that he was more "qualified for the position than Morgan," but has provided no evidence that Morgan was not "qualified." Afterkirk's "perception of his competence, and the incompetence of those competing against him is irrelevant; the search committee's perceptions and motivations are key."[7] As noted in Wrenn, laws developed for the purpose of preventing discriminatory practices do not usurp the discretion of employers to hire employees:

> It may be worthwhile to note here that Title VII does not diminish lawful traditional

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[5] See Laugesen v. Anaconda Co., 510 F.2d 307, 316-17 (6th Cir. Ky. 1975).

[6] Harker, supra, at 230.

[7] Wrenn v. Gould, 808 F.2d 493, 502 (6th Cir. 1987).

> management prerogatives in choosing among qualified candidates. So long as its reasons are not discriminatory, an employer is free to choose among qualified candidates. An employer has even greater flexibility in choosing a management level employee, as in the case here, because of the nature of such a position.[8] (Citations omitted)

Afterkirk maintains that the stated reasons for hiring Morgan were merely pre-textual and that administrative experience was not in the job description for the position. Although not labeled "administrative duties," the supervision, coordination, scheduling, and other activities stated are administrative duties and Afterkirk was certainly aware that such skills were required for the position. Similarly, his claim that Morgan was hired prior to the interview process is unsupported by facts and remains a mere allegation. Speculation and conjecture is not a basis to avoid summary judgment.[9]

The analysis of Afterkirk's disability discrimination claim is similar to that of his age discrimination claim. He is required to establish a prima facie case of discrimination, compelling the school district to "articulate a legitimate, nondiscriminatory reason for making the adverse employment decision.[10] He must establish that he is:

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[8] Id. at 502.

[9] Harker, supra, at 231.

[10] Noel v. Elk Brand Mfg. Co., Ky. App., 53 S.W.3d 95, 101 (2000).

> (1) a disabled person within the meaning of the Act, (2) that he is otherwise qualified to perform the essential functions of his job with or without reasonable accommodation, and (3) that he suffered an adverse employment decision due to his disability.[11]

The initial question is whether Afterkirk's knee problems render him disabled so that he is in the class the law protects. It is undisputed that Afterkirk has had knee surgery that presumably causes him difficulty. However, he has worked as a teacher, performed the duties of a baseball coach, and drives a school bus. To be disabled within the meaning of the Civil Rights Act he must demonstrate that his disability "substantially" limits a major life activity. In analyzing a disability discrimination claim under the Kentucky Civil Rights Act we are guided by the Americans with Disabilities Act.[12] Disability for the purpose of either is defined as follows:

> It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those "claiming the Act's protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by the impairment] in terms of their own experience . . . is substantial."[13] (Citations omitted).

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[11] Sullivan v. River Valley School District, 197 F.3d 804, 810 (6th Cir. 1999).

[12] See Noel, supra.

[13] Toyota Motor Mfg. Ky., Inc. v. Williams, 534 U.S. 184, 198, 122 S.Ct. 681, 692, 151 L.Ed.2d 615, 632 (2002).

There is no evidence that Afterkirk's knee impairment "substantially" limits his activities. He has been able to perform his duties for the school district as a driver's education teacher and coach. There is no evidence presented that physical limitations were even considered when the assistant athletic director's position was filled nor does Afterkirk dispute that there was no discussion regarding his physical ability to perform the duties of assistant athletic director. If Afterkirk believed he needed accommodation to perform the duties, he had the burden of proposing reasonable accommodations. In conclusion, there is no evidence that Afterkirk's knee problems are associated with the decision to hire Morgan.

Finally, there is absolutely no basis in fact for Afterkirk's claim that he was not hired in retaliation for requesting a transfer from his position as physical education teacher to a driver's education teacher after his return from disability leave. Until the present case, he did not oppose a practice declared unlawful nor did he make a charge, file a complaint, testify, assist, or participate in any investigation, proceeding or hearing under KRS[14] Chapter 344.[15]

The summary judgment is affirmed.

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[14] Kentucky Revised Statues.

[15] See KRS 344.280(1).

ALL CONCUR.

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